

(3)  
No. 87-698

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

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GEORGE W. MCMANUS, JR.,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

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PETITIONER'S REPLY MEMORANDUM

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In the Brief for the United States in Opposition, respondent admits of the possibility that the prosecution during petitioner's trial "disclosed third party [income tax] returns under circumstances in which Congress intended those returns to remain private." Typewritten Opposition, at 7. But respondent fails to acknowledge the enormity of the prosecution's violations of the Tax Disclosure Act, 26 U.S.C. § 6103, the blatant nature of the violations, and the devastating impact those violations had on the fairness of petitioner's trial.

1. Respondent argues that the Court of Appeals correctly concluded that confidential tax return information was used during petitioner's trial in a "limited" manner

and for a “fair and proper” purpose. That purpose, according to respondent, was to “shed light on the disputed issue of petitioner’s willfulness in evading payment of his income taxes . . . .” Typewritten Opposition, at 5. Respondent further asserts, without record citation, that “[t]he evidence at trial showed that by failing to provide certain of his employees and the Internal Revenue Service with W-2 or 1099 forms, petitioner allowed those employees to evade their income tax obligations,” which “tended to rebut petitioner’s defense that his underreporting of his own income was merely the product of inadvertence and carelessness.” *Id.* Thus, respondent relies on Federal Rule of Evidence 404(b) as support for the admissibility of the third-party tax returns and return information on grounds other than general impeachment of the witnesses.<sup>1</sup>

This argument cannot be presented by respondent in good faith. When the argument was presented on appeal, petitioner demonstrated that it is wholly fallacious. *See* Petition for Writ of Certiorari, at 12 n.4. First, the argument is not supported by the trial record. Respondent never attempted at trial to link petitioner to the failure of any of his employees to report all their taxable income. Some of the employees in question had received W-2 forms. *See, e.g.,* App. 135. The only witness who was asked denied that petitioner knew anything about her tax practices. App. 48.

Second, in making this belated effort at justifying its violations at trial of 26 U.S.C. § 6103(h), respondent ignores the fact of an agreement between counsel made prior to trial, an agreement that reveals this argument for what it is—a desperate afterthought advanced as a

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<sup>1</sup> Rule 404(b) provides that evidence of other crimes, wrongs or acts, while not admissible generally to prove that a defendant acted in conformity with those prior acts, may be admissible to prove intent, knowledge, or absence of a mistake.

last resort. Prior to trial, the prosecution entered into a discovery agreement by which it promised to disclose to defense counsel in advance of trial *all* evidence it would seek to have admitted under Rule 404(b). Disclosures were in fact made. But the respondent never disclosed any intention to utilize the tax returns of petitioner's employees, or of petitioner's alleged role in their tax practices, as supposed evidence of petitioner's own intent, knowledge or willfulness.<sup>2</sup>

This Court should not countenance the respondent's repeated failures simply to "bite the bullet" and to acknowledge that the prosecution obtained and used third-party tax returns of defense witnesses for the sole purpose of impeaching the credibility of their trial testimony, a purpose expressly prohibited by Congress. The alternative argument the respondent now presents is not supported by the trial record, and flies in the face of respondent's pre-trial discovery agreement.

2. Respondent focuses in its Opposition on the public disclosure at trial of the tax returns of two defense witnesses. Respondent ignores the record evidence that the prosecution obtained and used confidential tax returns and return information of at least three other former employees of petitioner's law firm who testified at trial. See Petition for Writ of Certiorari, at 5-7. In its legal analysis of the Tax Disclosure Act, respondent wholly ignores the fact that Congress prohibited not only the public dissemination of confidential third-party returns through their admission in evidence, but also the obtaining of such returns and return information by federal

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<sup>2</sup> The discovery agreement and the respondent's pre-trial disclosure of its Rule 404(b) evidence was attached as an Addendum to petitioner's Reply Brief filed in the Court of Appeals. In the light of this agreement, well known to respondent, it is difficult to imagine that respondent would continue to contend in this Court that the third-party tax returns were relevant to the issue of petitioner's willfulness and presented at trial for that purpose.

prosecutors. 26 U.S.C. § 6103(h)(2). *See* Petition for Writ of Certiorari, at 11. The trial record demonstrates that the prosecutors gained free access to the tax returns of all of petitioner's employees who might be called as witnesses—in wholesale violation of § 6103(h)(2) and its implementing Treasury Department regulations. *See* Treas. Reg. (26 C.F.R.) § 301.6103(h)(2) (1980).

Even at this late date respondent never has explained how the prosecution managed to arm itself with the income tax returns of potential witnesses in preparation for the trial of this case. What is clear, however, is that the violations of the Tax Disclosure Act were not "limited." They were blatant and wholesale.

3. Respondent does not mention in its Opposition that a prosecutor's violation of § 6103(h), if found to be willful, is itself a felony. 26 U.S.C. § 7213(a)(1). *See* Petition for Writ of Certiorari, at 16. And contrary to respondent's argument, the prosecution's ability to benefit at trial from its wholesale violations of § 6103(h) was terribly prejudicial to the fairness of petitioner's trial. The most critical evidence in support of petitioner's defense—including eyewitness testimony that he paid fleeting attention to the contents of his tax returns—was demolished by the impact of the prosecution's effective, but unlawful and unfair, attack on the credibility of the employee-witnesses. This attack was launched from the witnesses' own tax returns. *See* Petition for Writ of Certiorari, at 3-4. While the prosecution's technique made for effective courtroom theatrics, that technique was unlawful and unfairly prejudicial.

The Court of Appeals did not address the impact of the statutory violations at issue here on the fairness of petitioner's trial, because that Court accepted respondent's specious argument that its use of third-party tax returns at trial had been "limited, fair and proper." Respondent urges this Court to conclude that the statu-



tory violations were not sufficiently prejudicial to amount to "plain error." Typewritten Opposition, at 6. Petitioner disputes the applicability of the "plain error" standard to the prosecution's repeated violations at trial of the Tax Disclosure Act. See Petition for Writ of Certiorari, at 17-18. But even conceding that "plain error" applies, this Court should conclude that there are few situations likely to arise in the context of a criminal trial that more "seriously affect the fairness, integrity or public reputation of judicial proceedings" than for the prosecution to have obtained a tax conviction through repeated violations of provisions of the Internal Revenue Code that were designed by Congress to prevent the misuse and dissemination of confidential tax returns of third-party witnesses. See *United States v. Young*, 470 U.S. 1, 15 (1985).

Plenary review is warranted in this case to correct the Court of Appeals' erroneous construction of 26 U.S.C. § 6103(h), a construction that eviscerates this important remedial legislation of its essential purposes. Respondent's arguments seek only to divert this Court's gaze from the wholesale nature of the violations of that statute committed by the prosecution, and from the prejudicial impact those violations had on the fairness of petitioner's trial.

Respectfully submitted,

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